[redacted]

[redacted]

In the Supreme Court of the United States

[redacted]

No. 109 4

[redacted]

Petitioner,

vs.

[redacted]

Respondent.

[redacted]

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

[redacted]

[redacted]
[redacted]
[redacted]
Attorney for Petitioner.

[redacted]

TABLE OF CONTENTS

Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
The Manner in Which the Federal Questions Are Raised	4
Reasons For Granting the Writ	5
Conclusion	10
Appendix:	
A. Decision and Journal Entry of Probate Court	11
B. Rules of Practice of the Supreme Court of Ohio	15
C. Orders of the Supreme Court of Ohio Overruling Motion to Certify and Dismissing Appeal as of Right	16

TABLE OF AUTHORITIES.

Cases.

Goldstein *v.* Cox, 389 U.S. 581	10
Gorun *v.* Fall, 393 U.S. 398	9, 10
Kolovrat *v.* Oregon, 366 U.S. 187	6
Mora *v.* Battin, 20 Ohio Misc. 208	10
Shelley *v.* Kraemer, 334 U.S. 1	7, 8
Zschernig *v.* Miller, 389 U.S. 429	3, 9, 10

Constitution.

Constitution of the United States:	
Article I, Section 10	2
Amendment XIV	3

Other.

31 CFR 211.2	5
25 Federal Reg. 3458, 3526	5
Federal Register, June 25, 1968, Vol. 33, No. 123, Pages 9302 and 9303	5
28 U.S.C. Section 1257 (3)	1

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No.

JOHN SANFIRA,

Petitioner,

vs.

NICK D. MOGA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled cause on September 24, 1970.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion and judgment of the Probate Court are unreported and printed herein as Appendix "A." No opinion was rendered by the Court of Appeals or the Supreme Court of Ohio.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on September 24, 1970. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether a Court may give validity to and enforce a provision in a will that authorizes the withholding of an inheritance in trust "until such a time when the trustee is convinced that the control of the Communist Government of Romania will not interfere with the rights of my son to use his wealth as he sees fit * * *"?

2. Whether the ratification by the Probate Court of a political decision arrived at by a fiduciary constitutes a trespass by the court into an area where the Federal Constitution contemplates that only the National Government shall operate?

CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Article I. Section 10:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power,

or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Amendment XIV:

"* * * nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

George Sanfira died testate on June 16, 1961. The will was probated in the Probate Court of Cuyahoga County, Ohio. The present controversy revolves around the language contained in paragraph III of the will, the pertinent portion of which reads, as follows:

"all rest, residue and remainder of my estate * * * to Nick D. Moga, as Trustee. * * * In addition (the trustee) shall have power and authority to pay my said son (John Sanfira o.w. Ioan Sanfira) * * * the principal of the trust estate a sum not less than $50.00 until such a time when the trustee is convinced that the control of the Communist Government of Romania will not interfere with the right of my son to use his wealth as he sees fit. At that time the said trustee could terminate the trust, if my son so desires, and send the entire principal of the trust fund to him."

Upon learning that his inheritance has been placed in trust, the petitioner filed an application to terminate the trust which the probate court established in accordance with the aforementioned provision of the will. The application was heard by a Referee of the Probate Court who concluded that the trust provision under attack was invalid as being against public policy and contrary to this Court's decision in *Zschernig v. Miller*, 389 U.S. 429. This

Referee's judgment was appealed to the Probate Judge, who reversed his Referee and held that the trust provision is an enforceable "right and prerogative of a testator" to repose in a trustee "a discretionary right * * * to be used as he sees fit."

The Court of Appeals affirmed the decision of the Probate Judge, without opinion, and the Supreme Court of Ohio refused to review the decisions below.

The Manner in Which the Federal Questions Are Raised.

The petitioner sought review in the Supreme Court of Ohio of the decision of the Court of Appeals of Ohio affirming the judgment of the Probate Court.

The right to review by the Supreme Court of Ohio is dependent upon the discretion of the court in determining that a substantial constitutional question exists, or that the case is one of public or great general interest, "Appendix B."

In the proceedings before the Ohio Supreme Court, and the other lower courts, the petitioner argued that the adjudication of the legal issues presented involved Federal Constitutional considerations.

The Ohio Supreme Court, without a hearing, dismissed the appeal of this petitioner for the reason "that no substantial constitutional question exists herein," and overruled the petitioner's motion to certify, "Appendix C."

REASONS FOR GRANTING THE WRIT.

1. The decision of the Probate Court, which was affirmed by the appellate court of Ohio, and denied review by the Ohio Supreme Court, is contrary to public policy and disregards the established policy of the Federal Government which permits the free flow of funds to Romania.

A Court may not give validity to and enforce a provision in a will that permits a fiduciary to withhold the payment of a legacy to a non resident alien on political considerations reached by the fiduciary which are contrary to the public policy of the State of Ohio and the Federal policy of the United States.

Ever since the year 1951, the Federal Government, through its Treasury Department, has maintained a list of countries to which the sending of public funds is prohibited (commonly referred to as U. S. Treasury Circular 655). The inclusion or deletion of a country from such a list, constitutes a foreign policy determination of our Federal Government. The recent amendment of Circular 655 whereby Czechoslovakia was removed from the list of proscribed countries, contains an explicit statement that "* * * the amendment involves a foreign affairs function of the United States," see Federal Register, June 25, 1968, Vol. 33, No. 123, Pages 9302 and 9303.

Romania was removed from the Treasury list in April of 1960 as a result of the Financial Agreement between our government and Romania which was concluded on March 30, 1960. By virtue thereof, our government released all blocking controls over assets belonging to Romania, see 25 Federal Reg. 3458, 3526, and 31 CFR 211.2.

That the action of the Federal Government, as hereinabove set forth, constitutes the foreign policy of the United States with regard to Romania is clear. Agree-

ments entered into by our government have the same force and effect and attain the same stature as treaties in the formation of foreign policy. In *Kolovrat vs. Oregon*, 366 U.S. 187, this Court declared:

> "* * * state policies as to rights of aliens to inherit must give way under Constitution's Supremacy Clause to 'overriding federal treaties and conflicting arrangements.'"

For "state law must yield when it is inconsistent with, or impairs the *policy* of provisions of a treaty or *of an international compact or agreement*." (Italics supplied.)

Ever since the agreement of 1960, the Probate Court of Cuyahoga County (and throughout the State) in respect thereto, followed a policy of permitting the free flow of inheritances to heirs and beneficiaries in Romania. Any reasonable mind having knowledge of the Financial Treaty of March, 1960, between our government and Romania, and the subsequent policy ever since of the Probate Court permitting the payment of distributive shares to nationals and residents of Romania, can conclude only that the insertion of the contested trust clause in the decedent's will, and its attempted enforcement, constitute a deliberate effort to deny the sole legatee the right to immediate payment of his distributive share. The enforcement of the challenged provision by the court below, whereby the Romanian legatee was denied and is being denied the payment of his inheritance in full, is clearly contrary to the established policy of the Probate Court which has permitted the free flow of funds to residents of Romania for the past nine years. The question then arises whether the probate judge was authorized to validate and enforce a provision of a will which is against public policy

and, in fact, the policy of his own court? Admittedly, a party can dispose of his property as he pleases so long as his disposition does not violate the laws relevant thereto or the policy of the state. Moreover, his wishes may be respected even though they are in violation of public policy if they are to be fulfilled by a private arrangement. When, however, the power and authority of the State is invoked, through its judicial tribunals, to enforce such a disposition, then the entire matter must be viewed otherwise. Several examples of an analogous situation should help to elucidate the problem. The first and most common situation is the provision in a will which provides that a party shall be denied the inheritance if he should marry. Obviously, a judicial tribunal would not enforce such a provision since it is contrary to the public policy of promoting marriages. Another more timely and pertinent situation is the problem involved in the case of *Shelley v. Kraemer*, 334 U.S. 1. In *Shelley*, the jurisdiction of the court was invoked to enforce and to give validity to a restrictive covenant in a deed which prohibited the owner of real property from selling it to someone who was not of the Caucasian race. The provision had as its main purpose the exclusion of colored persons from owning or occupying real estate. In that case, as in ours, the instrument expressed the private wish of the party and could be given effect, privately among individuals. When, however, the authority of the State, through its courts, is invoked to enforce or contest such a provision, the entire matter is viewed and is considered in a different context. In the *Shelley* case, this Court invalidated the clause in the deed as being in violation of public policy as established by the equal protection of the laws provision of the 14th Amendment to the Constitution of the United States.

The rationale and rule in *Shelley* are applicable equally to the provisions of the will in our case. Quite clearly, a probate court, as an instrument of the State, cannot enforce and give legal effect to a document which would deny a party a right that is otherwise secured to him by state and federal law and policy.

2. The decision below raises significant and recurring problems and conflicts with decisions of this court in the area of constitutional limitations of state courts.

The ratification by the Probate Court of a political decision arrived at by the Fiduciary amounts to a trespass by the Court into an area where the Federal Constitution contemplates that only the National Government shall operate.

The deprivation of the right to the funds to which the petitioner is and had been entitled as a legatee, ever since the time of the closing of the estate in 1962, and the continued withholding of his inheritance in full, has been accomplished by a political decision on the part of the respondent to wit: that the legatee-beneficiary in Romania would not have the use of the money because of the interference and control of the Communist Government of Romania. This political decision was enforced and validated by the Probate Court. Such action on the part of the Court does violence to and militates against the established policy of the Court that favors and allows the payment of an inheritance to a party entitled thereto who resides in Romania. Additionally, and more seriously, the enforcement by the Probate Court of the political decision of the appellee totally disregards and is in conflict with the relevant and controlling constitutional provisions of the United States. In connection with the Agreement of March 30, 1960, between our government and Romania, the Secretary of the Treasury of the United States de-

termined that residents and nationals of Romania would have the use, benefit and control of money sent to them from the United States. This determination by the Federal Government, as we have seen, is a political foreign policy decision of the Federal Government and, therefore, overrides any conflicting decision which a court may make. By sanctioning the action of the respondent in withholding the funds belonging to the petitioner, the court has placed itself in contradiction to and in conflict with the policy of the Federal Government which permits the free flow of funds to Romania.

In a recent appeal to this Court from a decision of a three judge federal district court in Montana, *Gorun v. Fall*, 393 U.S. 398, decided January 20, 1969, Mr. Justice Douglas, in an opinion, concurred in by Mr. Justice Black, Mr. Justice Harlan and Mr. Justice Fortas, declared, as follows:

> "Federal Policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See Fed. Reg. 3458. At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See Fed. Reg. 3526; 31 CFR 211.2. *As our opinion in Zschernig makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that policy.*" (Emphasis supplied.)

A careful reading of the decision challenged herein, will readily reveal that the Probate Judge, in enforcing the trust provision of this case, has made a ruling that prohibits the sending of funds to Romania contrary to "Federal Policy which permits the free flow of funds to Romania." This, the Probate Judge was not authorized to do according to *Zschernig* and *Gorun*. Furthermore, the

ratification of a political decision arrived at by the Trustee, amounts to a trespass by the court "upon an area where the Constitution contemplates that only the National Government shall operate," *Zschernig v. Miller*. Mr. Justice Douglas, in the majority opinion in *Zschernig*, stated that the so-called "Iron Curtain" statutes are "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress." A provision in a will, such as ours, which seeks to bring about a result similar to that intended by the so-called "Iron Curtain" statute, "suffers from the same fatal infirmity." The enforcement of this provision launches the court "upon a prohibited voyage into a domain of exclusively federal competence."

In July of 1969, a three-judge federal court invalidated the Ohio so-called "Iron Curtain" statute, *Mora v. Battin*, 20 Ohio Misc. 208.

A careful reading and a thorough comprehension of *Zschernig*, *Gorun*, *Mora* and *Goldstein v. Cox*, 389 U.S. 581, will lead to the inescapable conclusion that the decisions of those cases are dispositive of the legal issues herein.

The decision complained of violates the federal constitutional rights secured to this petitioner.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Petitioner.

APPENDIX A.

Decision and Journal Entry of Probate Court.

Doc. 618 No. 619334.

IN THE PROBATE COURT

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

In re: Trusteeship Under
Will of George
Sanfira, o.w.
George Sanfiro,
Deceased

JOURNAL ENTRY.

This matter came before the court upon exceptions to the decision of a referee terminating a trust under the Will of George Sanfira brought by the trustee appointed under the said will.

The uncontroverted facts are that George Sanfira o.w. George Sanfiro died on the 16th day of June, 1961, leaving a Last Will and Testament which has been duly probated in this court on June 17, 1961, and recorded in Volume 1043, page 36.

After directing the payment of all debts and requesting the executor to make all arrangements for his funeral, George Sanfira set forth, in Item III of his will, the following language:

> "All the rest, residue and remainder of my property, of every kind and description, and wheresoever located, I give, devise and bequeath to my good friend, Nick D. Moga, of Cleveland, Ohio, as trustee, with full power, without any order of court, to control, sell, dispose of or lease all or any part thereof, for any term, without regard to the duration of the trust, and to invest and re-invest, as is proper under the

law of Ohio, with the right to retain as investments and property coming to said trustee from my estate, without liability for depreciation in value.

"The net income from the trust estate shall be paid to my son, Ioan Sanfira, Commune of Solnoc, Dobarca, Romania, in quarterly installments or oftener during his life. In addition to such payment of income, the trustee shall have power and authority to pay my said son in quarterly installments or oftener the principal of the trust estate a sum of not less than Fifty ($50.00) Dollars until such a time when the trustee is convinced that the control of the Communist Government of Romania, will not interfere with the right of my son to use his wealth as he sees fit.

"At that time the said trustee could terminate the trust, if my son so desires, and send the entire principal of the trust fund to him.

"In the case that my son will predecease me or surviving me he predeceases the termination of the principal of the trust estate, the beneficiary of the trust estate will be his heirs of the body who are alive.

"Upon the distribution of principal as provided for herein, the trust terminates."

The above item of the will is challenged by John R. Vintilla, duly appointed attorney-in-fact for Ioan Sanfira, who is still living in Romania, on the basis that the language in Item III authorizing the trustee to pay Ioan Sanfira the principal of the estate "when the trustee is convinced that the control of the Communist Government of Romania will not interfere with the right of my son to use his wealth as he sees fit," is void because it is against public policy of the United States and totally unenforceable.

In support of this contention, attorney-in-fact Vintilla cites several cases, which essentially represent the decision of the United States Supreme Court, which, on January

15, 1968, in the case of *Zschernig vs. Miller*, 389 U.S. 429, held that Oregon statutes concerning the escheatment of personal property to the State of Oregon where there are non-resident aliens claiming the personal property unless certain conditions are met, was invalid because these provisions in Oregon Law involved the state in foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government.

This decision was further amplified by *Gorun vs. Fall*, 21 L. Ed. 2d 628, decided on January 20, 1969 in which the court stated, "* * * As our opinion in *Zschernig* makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy."

Trustee Moga, while not denying the above decision, argues that the contested language in the will is not within the purview of either case, inasmuch as it merely refers to a discretionary right of the trustee and not an interpretation of a state statute contrary to the foreign policy of the Federal Government.

Having given full and fair consideration to the evidence, the arguments of counsel, and the law, the court does hereby find that George Sanfira did set up a bona fide trust in his last will and testament. Provisions therein provided for the termination of the trust upon the meeting of two conditions: 1) the trustee becoming convinced that the control of the Communist Government of Romania will not interfere with the right of son Ioan Sanfira to use his wealth as he sees fit, and 2) the son Ioan Sanfira desiring the trust to be concluded and wishing to receive the entire principal remaining.

Although there is some question in the court's mind about the son desiring to receive the remaining portions

of the principal, there is no doubt that the trustee, Nick D. Moga, is not convinced that the Communist Government will not interfere with the right of Ioan Sanfira to use his funds, and therefore, since that condition has not been met, the trust cannot be allowed to terminate.

Although the cases cited seem to be quite clear in indicating that states cannot pass various statutes to impede the transfer of funds to nationals of foreign governments where there are proper treaties, such as is the case with Romania, it is equally clear that the United States Government cannot dictate to a person framing his last will and testament what the discretions of a trustee under that will shall be.

The contested provision is no more than a discretionary right given to the trustee to be used as he sees fit. The balance of the will fully indicates the full faith and trust the decedent had in this trustee in that he explicitly devolved upon this trustee the sole discretion to make a determination, right or wrong, as to the control of the Romanian Government over its citizens regardless of what the foreign policy between the United States of America and that country might be.

This is well within the right and the prerogative of any testator and it cannot be disturbed any more than any other discretionary right of a trustee properly set forth in the last will and testament of a decedent.

Therefore, the decision of the referee is overruled and the trust is ordered to remain in full force and effect.

JOSEPH W. BARTUNEK,
Judge of the Probate Court.

APPENDIX B.

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

RULE II.

Section 3. Consideration as to Existence of Constitutional Question.

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal.

(B) Where appellant claims that he has an appeal as of right (*i.e.*, that the case involves a constitutional question), the Supreme Court will *sua sponte* consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

APPENDIX C.

ORDERS OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY AND DISMISSING APPEAL AS OF RIGHT.

No. 70-308

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

1970 TERM

To wit: September 24, 1970

In re Trusteeship Under Will of George Sanfira:

JOHN SANFIRA, *Appellant*,

vs.

NICK D. MOZA, *Trustee, Appellee*.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

(Certification omitted.)

* * * * *

(Caption as above.)

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Probate Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

(Certification omitted.)